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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.)

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

SUPPLEMENTAL BRIEF FOR APPELLEES

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Preliminary Statement

By order dated November 15, 1976, the Court granted the appellants' motion for leave to file a supplemental brief to consider the impact, if any, on this appeal of the enactment of the Resource Conservation and Recovery Act of 1976 (Pub. Law 94-580). The order further allowed each side twenty-one days within which to file such a brief.

ARGUMENT

The Resource Conservation and Recovery Act of 1976 does not pre-empt New Jersey's prohibition against the disposal of waste originating out of state, but rather supports the conclusion that waste disposal does not involve the national interest in the maintenance of an open economy which the Commerce Clause was designed to protect.

It is now well established that an intent to pre-empt state legislation should not be inferred unless there is "an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132, 147 (1963). The Court has been particularly reluctant to find an intent to pre-empt state legislation which has been enacted to serve environmental interests. *Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325 (1973); *Huron Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). Therefore, the appellants must bear the heavy burden of demonstrating an unambiguous congressional mandate that the Resource Conservation and Recovery Act of 1976 (hereinafter "the Act") pre-empts New Jersey's statute prohibiting the disposal of waste originating out of state.

Preliminarily, note should be taken of the procedural route by which the appellants' pre-emption claim comes before the Court. Since the Act was not signed by the President until October 21, 1976, the state courts had no opportunity to consider its effect. Furthermore, there was no claim of pre-emption raised by the appellants either in their jurisdictional statement, initial brief on the merits or in oral argument. These circumstances ordinarily would bar the appellants from raising the claim at this late date. *Cardinale* v. *State of Louisiana,* 394 U.S. 437 (1969). However, an exception to the ordinary practice is recognized where there has been a supervening change in the law which may obviate the need for the Court to reach the issue initially projected for review. *United States* v. *New Jersey State Lottery Commission,* 420 U.S. 371 (1975). Therefore, if it could be concluded that the Act on its face totally pre-empted the New Jersey legislation, it might be appropriate to dispose of the case on those grounds.

However, it is clear that the main sections of the Act have no operative effect at this time and that the contours of future federal regulation are contingent upon implementing administrative action, the form of which cannot now be predicted. Therefore, there is no substantial basis on which it can be argued that the Act on its face pre-empts or in any way undermines the validity of New Jersey's prohibition against the disposal within the State of waste originating out of state. On the contrary, the only sense in which the Act bears on this case is that it contains express congressional recognition of the principal premises on which defense of the validity of the New Jersey statute rests.

First, the Act contains an express congressional recognition of the fact that solid waste disposal is not a sub-

ject of ordinary commercial dealings controlled by the free market principles of the Commerce Clause but rather a subject which directly affects the environment and public health. Thus, section 1002(b) states that:

> "(b) ENVIRONMENT AND HEALTH.—The Congress finds with respect to the environment and health, that—
>
> "(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;
>
> "(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;
>
> "(3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;
>
> "(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;
>
> "(5) hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and
>
> "(6) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken; . . ."

Secondly, the Act constitutes an express congressional recognition that the problems of solid waste disposal are primarily of state and local, not national, concern. Thus, §1002(a)(4) states that ". . . the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies. . . ." This point is underscored by the comments during deliberations on the bill on the floor of the Senate. The co-sponsor of the bill, Senator Randolph, stated:

> "In developing this legislation, the members of the Committee on Public Works recognized that solid waste is a uniquely local problem and that programs in this area should be developed and managed at the local government level.
>
> "This is not an area which lends itself to extensive planning and operation from the Federal level. The role of the Federal Government in solid waste activities should be one primarily of providing financial and technical assistance. Guidelines authorized by this legislation are to be descriptive of the options available to local and regional bodies responsible for solid waste management. These guidelines should not be taken as directives from the Federal Government for a position by the local authorities.
>
> "Guidelines should provide the States and area planning agencies with maximum flexibility, while

assuring that such agencies or organizations have adequate information to effectively implement the planning provisions.

"To assure that the Federal Government adopts a proper place in this program, I emphasize the Administrator of the Environmental Protection Agency is required to notify the Congress before the publication of guidelines, information or model codes, ordinances or statutes. The agency is restricted under the provisions of the bill from advocating specific policy alternatives at the State or local level. These matters are best left—and I emphasize this—to local choice since they involve substantial regional variations. It is not appropriate for the Environmental Protection Agency to become involved other than in the provision of technical assistance on request." 122 Cong. Rec. 11069 (1976) (remarks of Senator Randolph).

These views were echoed by Senator Stafford of Vermont (Id. at 11071), Senator Baker of Tennessee (Id. at 11072) and Senator Dole of Kansas (Id. at 11094-11095). No contrary view was expressed. See also S. Rep. No. 94-988, 94th Cong., 2nd Sess. 11 (1976).

A review of the individual subsections of the Act also shows that its overall design was to foster the waste disposal programs of the states rather than to pre-empt the field at the federal level. The Act represents a significant new federal commitment to participate in solving the problems of solid waste collection and disposal. However, with limited exceptions discussed below, the Act does not purport to override state legislation dealing with the problems of solid waste management. The Act provides in §2003 for the establishment by the Administrator of the

Environmental Protection Agency (hereinafter "EPA") of "Resource Conservation and Recovery Panels", consisting of technical, marketing, financial and institutional specialists, which will have the responsibility of providing "States and local governments upon request with technical assistance on solid waste management, resource recovery and resource conservation." §2004 establishes a program of federal grants to assist private and public purchasers of tire shredders. §7007 authorizes federal grants to train State and local personnel to carry out solid waste and resource recovery programs. Federal funding of research and development and demonstration projects are authorized by §8001 and §8004. The sections are all elements of an overall congressional design to leave the responsibility for dealing with the problems of solid waste at the state and local level but at the same time to provide federal financial and technical assistance.

The one area in which the federal government has assumed a direct regulatory responsibility is with respect to hazardous waste. The Administrator of EPA has the responsibility under §3001 for identifying the characteristics of hazardous waste and listing particular hazardous wastes not later than eighteen months after enactment of the Act. The Administrator is required within the same period to promulgate regulations governing the generation, storage, transportation and disposal of hazardous waste. §3002-3005. The Administrator also may delegate the responsibility for regulation of hazardous wastes to state authorities. §3006.

Although the exact parameters of the eventual federal regulation of hazardous waste are difficult to predict at this time, it is clear that the assumption of federal regulatory control over the subject has no immediate impact upon New Jersey's prohibition against the disposal of

waste originating out-of-state and only a limited potential long range impact. First, these sections of the Act are not self-implementing but rather are dependent upon the promulgation by the Administrator of EPA of a list of hazardous wastes and of regulations governing their generation, storage, transportation and disposal. Since the Administrator has eighteen months within which to promulgate such lists and regulations, the federal regulation of this area probably will not become operative at all for nearly a year and a half. It is firmly established that such potential future regulation of a subject matter by a federal agency does not pre-empt present regulation by the states. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U.S. 714, 723-724 (1963); *Welch Co.* v. *New Hampshire,* 306 U.S. 79, 84-85 (1939).

Secondly, even when the federal regulatory program becomes operative, it will be limited to "hazardous wastes". This term is generally understood in the field of solid waste management to apply solely to industrial wastes which are inherently dangerous to plant and animal life. The Senate Committee on Public Works noted in its report on the Act that "[m]aterials of major concern are arsenic wastes, insecticide and pesticide residues, waste oil, explosive wastes, sludge contaminated with metals such as chromium and zinc, and radioactive wastes." S. Rep. No. 94-988, 94th Cong., 2nd Sess. 3 (1976); see also 40 Fed. Reg. 42993 (1975); 1 U.S. Environmental Protection Agency, *Proceedings 1975 Public Meetings on Hazardous Waste Management* 8 (1976). In the Act, "hazardous waste" is defined as:

> ". . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—

> "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> "(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." §1004(5).

In addition, the Administrator is directed, in listing the "hazardous wastes" which will be subject to federal regulation, to take into account ". . . toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." §3001. It seems clear that ordinary household and commercial waste, or garbage, would not fall within these criteria for defining "hazardous waste" and thus would not be subject to federal regulation under §3001-3011 of the Act. This conclusion is confirmed by the Report of the Senate Committee on Public Works on the Act which expressly states that the permit system for hazardous wastes ". . . is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 94-988, 94th Cong., 2nd Sess., 16 (1976). Since the New Jersey statute as limited by its implementing regulations (App. 92-96) is primarily directed towards general municipal waste and the appellants apparently are engaged solely in the disposal of such waste, it would appear that the federal regulation of "hazardous waste" would have no effect upon the subject matter of this case even when that regulatory program becomes operative.

Finally, even as to "hazardous wastes", the Act indicates that state regulation may continue so long as it is

not "less stringent" than federal regulations. §3009. Since the eventual promulgation by the Administrator of regulations which would conflict with the prohibition against the disposal of waste originating out of state is a matter of pure conjecture, it is uncertain at this time whether there will be any conflict between the New Jersey statute and federal regulation even with respect to the limited area of "hazardous wastes". Therefore, the provisions of the Resource Conservation and Recovery Act of 1976 regarding "hazardous wastes" do not undercut the validity of the New Jersey statute.

In addition to providing for direct federal regulation of the subject of "hazardous waste", the Act also establishes a system of incentives for regional planning with respect to the reclamation or disposal of other solid wastes. The Act contemplates joint federal-state action, first, to identify regions appropriate for solid waste planning, and second, to adopt regulations for solid waste management in such regions. First, §4002(a) provides that within 180 days after enactment of the Act, the Administrator of EPA ". . . after consultation with appropriate Federal, State, and local authorities, shall by regulation publish guidelines for the identification of those areas which have common solid waste problems and are appropriate units for planning regional solid waste management services." §4006(a) provides that within 180 days after adoption of the federal guidelines, ". . . the Governor of each State, after consultation with local elected officials, shall promulgate regulations based on such guidelines identifying the boundaries of each area within the State which, as a result of urban concentrations, geographic conditions, markets, and other factors, is appropriate for carrying out regional solid waste management." §4006(c) also provides that such regions may embrace more than one State in which event ". . . the Governors of the

respective states . . . shall enter into agreements identifying the boundaries of such region." §4006(b) provides that within a third 180 day period the State shall ". . . (A) identify an agency to develop the State plan and identify one or more agencies to implement such plan, and (B) identify which solid waste functions will, under such State plan, be planned for and carried out by the State and which such functions will, under such State plan, be planned for and carried out by a regional or local authority or a combination of regional or local and State authorities." Second, with respect to the solid waste regions established under §4002(a) and §4006(a), (b) and (c), eighteen months after enactment of the Act, ". . . the Administrator shall, atfer consultation with appropriate Federal, State, and local authorities, promulgate regulations containing guidelines to assist in the development and implementation of State solid waste management plans." The Act does not contain any specific time period within which State solid waste management plans should be submitted, but it authorizes appropriations for solid waste planning and provides that a State must have a State plan which has been approved by the Administrator in order to be eligible for such federal financial assistance. §4007(b).

Although the exact future scope of federally supervised regional solid waste planning by state and local agencies, like the direct federal regulation of hazardous wastes, cannot be forecast with any assurance, it is clear that it has no immediate impact upon New Jersey prohibition against the disposal of waste originating out of state and that any long range effect upon the prohibition is purely conjectural. First, the regional planning provisions of the Act are not self-implementing but rather will become operative only after administrative action at both federal and state levels. The Administrator of EPA has

180 days after enactment of the Act to publish guidelines for identifying regional solid waste planning areas, and thereafter the Governors of the States have two further 180 day periods for identifying the boundaries of regional planning areas and the agencies to carry out such planning; there is thus an overall period of nearly eighteen months before regional planning areas and implementing agencies even will be identified. The Administrator of EPA has the same eighteen month period within which to promulgate guidelines for State solid waste management plans. Although the Act sets no deadline for the actual submission of regional plans, it must be assumed that some additional period will be required for this purpose beyond the eighteen months allowed for identifying planning regions and implementing agencies. Consequently, it will be several years before regional plans under the Act become operative. Therefore, assuming *arguendo* the possibility that New Jersey's prohibition against the disposal of waste originating out of state could conflict with such plans, such possible future action by a federal regulatory agency does not undermine the present validity of New Jersey's law. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, supra; Welch Co.* v. *New Hampshire, supra.*

Secondly, there is no express indication in the Act that a State is required to participate in the program of regional planning provided thereunder. Rather, it appears that the sole consequence of a failure to engage in such regional planning is the loss of federal financial assistance under this subsection of the Act. If this reading of the Act is correct, then it is a matter of conjecture whether New Jersey will even subject itself to these provisions of the Act.

Thirdly, assuming the federal scheme of supervision of regional planning becomes operative, the only way in

which there could be a conflict between the New Jersey statute and a regional plan under the Act is if the plans of New Jersey and its neighboring states include "interstate regions" pursuant to §4006(c). There is of course no way of knowing at this time whether the guidelines to be promulgated by the Administrator under §4002(a) will suggest the appropriateness of any interstate region encompassing New Jersey. Furthermore, the Act contemplates that the identification of interstate regions and planning agencies shall be by "agreement" between the Governors of the respective states. The essentially voluntary nature of such regional planning is confirmed by the numerous statements in the legislative history of a congressional intent that ". . . States and areawide solid waste management planning agencies have free choice in selecting the elements of their solid waste management plans. S. Rep. No. 94-988, 94th Cong., 2nd Sess., 11 (1976). See also 122 Cong. Rec. 11069 (1976) (comments of Senator Randolph); *Id.* at 11071 (comments of Senator Stafford); *Id.* at 11072 (comments of Senator Baker); *Id.* at 11094-11095 (comments of Senator Dole).* This point is stated with particular clarity in the Report of the House Commerce Committee:

> "It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative.

---

* One exception to the general design of local option with respect to state plans is the requirement that open dumps be eliminated. See §4005.

> "Simply, the discarded materials problem is one of planning and the Committee anticipates that federal guidelines for planning will foster the necessary cooperation between the federal government, states, and local regions, to meet very broad and flexible objectives of this act. If those objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning." H. Rep. No. 94-1491, at 33.

The extent to which "interstate agreements" might be reached pursuant to §4006(c) and the form they would take is therefore a matter of conjecture. Furthermore, even if the procedures of the Act eventually were to result in an agreement between the Governors of the respective states which was inconsistent with a total ban on the disposal in New Jersey of out-of-state waste, this would not result in an invalidation of the New Jersey statute. Rather, it would simply provide an appropriate occasion for a further exercise by the New Jersey Commissioner of Environmental Protection of his power to adopt exceptions from the total ban where that can be done ". . . without endangering the public health, safety and welfare. . . ." N.J.S.A. 13:1I-10.

In sum, the enactment of the Resource Conservation and Recovery Act of 1976 does not pre-empt or in any way undercut the validity of the New Jersey legislation prohibiting the disposal of waste originating out of state. Rather, it reflects congressional concurrence with the view that the disposal of waste does not involve the national interest in maintenance of an open economy which the

Commerce Clause was designed to protect, but instead the discharge by government under the police power of a fundamental responsibility to provide for the disposal of waste generated by its inhabitants with the least possible adverse impact upon health, the environment and land use. Furthermore, recognition of the fact that a political subdivision of a state, such as the appellant City of Philadelphia, cannot invoke the negative implications of the Commerce Clause to force the State of New Jersey to dispose of its waste and to suffer the resulting environmental harms, does not mean that interstate approaches to solid waste management problems are inappropriate. Nor does it mean that Congress lacks the authority to compel the states under appropriate circumstances to deal with waste disposal problems on a regional or national basis. It simply recognizes that the problems of waste disposal, like the problems associated with the investigation and prosecution of crime, are governmental problems, rather than ordinary commercial transactions, and that regional approaches should be the product of agreement between the responsible state officials, or the mandate of Congress, and not an unplanned by-product of the whims of the marketplace. The Resource Conservation and Recovery Act of 1976 provides a congressional legislative framework for just such cooperative governmental arrangements by agreement between the states and, to a limited extent, by direct regulatory activity of the federal government. However, the main provisions of the Act will not become operative for several years and even when the Act does become fully effective, it is purely conjectural whether there would be any conflict between the administration of the Act and enforcement of the prohibition against the disposal within New Jersey of waste originating out of state. Therefore, the Act does not impair the facial validity of the New Jersey legislation.

CONCLUSION

It is respectfully submitted that for the reasons expressed in our principal brief on the merits and in this supplemental brief the judgment of the Supreme Court of New Jersey should be affirmed.

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